No. 80-348

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

H.A. ARTISTS & ASSOCIATES, INC., S.T.E. REPRESENTATION LTD., J. MICHAEL BLOOM, LTD., DON BUCHWALD & ASSOCIATES, INC., MARJE FIELDS, INC., HENDERSON/HOGAN AGENCY INC., OPPENHEIM-CHRISTIE ASSOCIATES LTD., JOEL PITT LTD., TALENT REPRESENTATIVES INC., D.M.I. TALENT ASSOCIATES, LTD., JEAN THOMAS AGENCY, INC., BOB WATERS AGENCY, INC., JACOBSON-WILDER, INC., WILLIAM D. CUNNINGHAM & ASSOCIATES, INC., TRANUM ROBERTSON & HUGHES, INC., MONTY SILVER AGENCY LTD., BRET ADAMS, LIMITED, MICHAEL THOMAS AGENCY, INC., LESTER LEWIS ASSOCIATES, INC., LEAVERTON ASSOCIATES LTD., JOE JORDAN TALENT AGENCY INC., RAGLYN-SHAMSKY, LTD., ANN WRIGHT REPRESENTATIVES INC.,

Petitioners,

—against—

ACTORS' EQUITY ASSOCIATION, an unincorporated association, and DONALD GRODY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES DONELAN, ESQ.
311 Main Street
Worcester, Mass. 01608
(617) 791-3511

HOWARD BREINDEL, ESQ.
530 Fifth Avenue
New York, New York 10036
(212) 221-3760

Of Counsel:
BOWDITCH & DEWEY
SOLIN & BREINDEL, P.C.

Questions Presented

The questions presented must be considered in light of major factual differences between *American Federation of Musicians* v. *Carroll,* 391 U.S. 99 (1967) *("Carroll"),* the authority followed by the Courts below and this case. In *Carroll, supra,* the defendant union did not have a collective bargaining agreement with the employers of the union's members and the booking agents, who obtained jobs for the union members, were not licensed as employment agencies under New York State law. In the present case, Actors' Equity Association ("Equity" or the "Union"), the defendant union, has collective bargaining agreements with the employers of its members which set forth the minimum wages the employers must pay union members and the theatrical agents are licensed as employment agents.

The questions presented for review in this petition, under these circumstances, are:

1. Should the holding in *Carroll* that booking agents are members of a "labor group" and thus can be regulated with antitrust immunity by the union whose members they represent be confined to fact situations where the union does not have a collective bargaining agreement with the employers of its members?

2. Should *Carroll,* which primarily dealt with a union's regulation of orchestra leaders (who are themselves union members) who compete with union members and who employ union members, be overruled to the extent that it holds that agents who are employed by union members are part of the union's "labor group"?

3. Should the holding in *Carroll* permit Equity to unilaterally forbid franchised theatrical agents from charging

commissions on scale or minimum jobs obtained for Equity members?

4. Should the holding in *Carroll* be extended to permit the Union, which prohibits its members from employing theatrical agents who are not franchised by the Union, to extract franchise fees from theatrical agents as payment for the right to be regulated and dominated by the Union?

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
A. Introduction	3
B. Statement of Facts	4
C. Proceedings Below	7
Reasons For Granting the Writ	7
I. The Courts Below Improperly Interpreted and Extended This Court's Decision in *Carroll*	11
II. *Carroll*, as Applied to Agents, Should Be Overruled	15
III. The Courts Below Improperly Extended *Carroll* to Permit Unions to Require Agents to Work For Nothing	16
IV. The Courts Below Improperly Extended *Carroll* to Permit Unions to Extract Franchise Fees From Compulsorily Franchised Agents For the Privilege of Being Regulated and Dominated by the Union	17
Conclusion	19

APPENDICES PAGE

Appendix A:

Second Circuit Affirmance of District Court's Opinion Dismissing the Complaint, dated May 23, 1980. 1980-2 Trade Reg. Rep. 63,376 ..... A-1

Appendix B:

District Court Opinion Dismissing the Complaint, dated October 24, 1979, 478 F. Supp. 496 (1979 S.D.N.Y.) B-1

Appendix C:

Second Circuit Affirmance of District Court's Denial of a Motion for Preliminary Injunction, dated November 9, 1978 ..... C-1

Appendix D:

District Court's Denial of A Motion for Preliminary Injunction, dated June 29, 1978 ..... D-1

Appendix E:

Clayton Act §20 (15 U.S.C. §52) E-1

Appendix F:

Norris-LaGuardia Act §§5-15 (29 U.S.C. §§105-115) F-1

Appendix G:

§§180, 183, and 185 ("Employment Agencies") of the General Business Law of the State of New York (McKinney 1968) G-1

Table of Authorities

Cases: PAGE

Albrecht v. *The Herald Co.*, 390 U.S. 145 (1968) 9
Adams, Ray & Rosenberg v. *William Morris Agency*, 411 F.Supp. 403 (C.D. Ca. 1976) 12n
American Federation of Musicians of The United States and Canada v. *Carroll*, 391 U.S. 99 (1968) ..*passim*

Connell Construction Co., Inc. v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975) 9

Dr. Miles Medical Company v. *John D. Park & Sons Company*, 220 U.S. 373 (1911) 9
Duplan Corp. v. *Deering Milliken Inc.*, 444 F.Supp. 648 (D.S.C. 1977) 9-10

Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975), *rehearing denied*, 423 U.S. 886 (1975) 9

H.A. Artists, et al. v. *Actors' Equity Ass'n and Donald Grody*, 478 F.Supp. 496 (S.D.N.Y. 1979) .....*passim*
H.A. Artists, et al. v. *Actors' Equity Ass'n and Donald Grody*, 1980-2 Trade Reg. Rep. 63,376 (2d Cir. 1980) .....*passim*
Home Box Office, Inc. v. *Director's Guild of America Inc.*, 83 F.R.D. 423 (S.D.N.Y. 1979) 11

Interstate Circuit v. *U.S.*, 306 U.S. 208 (1939) 9

Jou-Jou Designs v. *ILGWU*, 1980-2 Trade Reg. Rep. 63,402 (S.D.N.Y. 1980) 8

Klor's Inc. v. *Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959) 9

PAGE

Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO v. *Jewel Tea Co., Inc.*, 381 U.S. 676 (1965) 9

Packaged Programs Inc. v. *Westinghouse Broadcast Co. Inc.*, 255 F.2d 708 (3d Cir. 1958) 10

Radiant Burners, Inc. v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) 9

Redfield v. *AFM*, 603 F.2d 214 (2d Cir. 1979) 13n

United States v. *General Dyestuff Corporation*, 57 F. Supp. 642 (S.D.N.Y. 1944) 9

Other Authorities:

Bartosic, The Supreme Court, 1974 Term, 62 Va. L. Rev., 533 (1976) 11n

Case Notes, Labor Law-Antitrust Liability of Labor Unions, 15 B.C. Ind. Comm. L. Rev. 595 (1974) 11n

Consolidated Express: Antitrust Liability for Illegal Labor Activities, 80 Columbia Law Review 644 (April 1980) 10

DiCola, Labor Antitrust: Pennington, Jewel Tea and Subsequent Meandering, 33 U. Pitt. L. Rev. 705, 747 (1972) 12n

Statutes and Rules:

Clayton Act (15 U.S.C. §§12-27)
§6 (15 U.S.C. §17) 2
§16 (15 U.S.C. §26) 3
§20 (29 U.S.C. §52) 2

PAGE

New York General Business Law Article II §§180, 183, 185 (McKinney 1968) 2, 4

Norris-LaGuardia Act §§5-15 (29 U.S.C. §§105-115) 2

Sherman Act §1 (15 U.S.C. §§1 *et seq.*)
§1 (15 U.S.C. §1) 2, 3
§2 (15 U.S.C. §2) 2, 3

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Petitioners,

—against—

ACTORS' EQUITY ASSOCIATION, an unincorporated association, and DONALD GRODY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 23, 1980.

Opinions Below

The opinion of the Court of Appeals [reported at 1980-2 CCH Trade Reg. Rep., ¶ 63,376 (2d Cir. 1980)] is attached

as Appendix A to the petition. The opinion of the District Court is reported at 478 F.Supp. 496 (S.D.N.Y. 1979) (Motley, J.). A copy of that opinion is attached as Appendix B to this petition. An earlier decision of the Court of Appeals, a copy of which is attached to this petition as Appendix C, affirmed the District Court's denial of a motion for a preliminary injunction, a copy of which is attached to this petition as Appendix D.

Jurisdiction

The judgment of the Court of Appeals was entered on May 23, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

Statutes Involved

1. Section 1 of the Sherman Act (15 U.S.C. §1) provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared illegal . . ."

2. Section 2 of the Sherman Act (15 U.S.C. §2) provides, in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."

3. Section 6 of the Clayton Act (15 U.S.C. §17) provides, in pertinent part:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust

laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

4. Section 20 of the Clayton Act (15 U.S.C. §52) is attached to this petition as Appendix E.

5. Sections 5-15 of the Norris-LaGuardia Act (29 U.S.C. §§105-115) are attached to this petition as Appendix F.

6. Sections 180, 183 and 185 of Article 11 ("Employment Agencies") of the General Business Law of the State of New York (McKinney 1968) are attached to this petition as Appendix G.

Statement of the Case

A. *Introduction*

Petitioners are theatrical agents (sometimes hereinafter referred to as "Agents"). Equity is a union whose members include virtually all actors appearing in legitimate theatrical productions in the United States. Respondent, Donald Grody, is Executive Secretary of the Union.

This is an action for injunctive relief (only) under §16 of the Clayton Act (15 U.S.C. §26) alleging that the Union's conduct is violative of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2). The Agents claim that the Union's compulsory franchising system for theatrical agents which

prohibits Union members from dealing with nonfranchised agents such as petitioners, constitutes a price fix, an agreement not to compete, a group boycott of nonfranchised agents and monopolization, in violation of the Sherman Act.

B. ***Statement of Facts***

"Actors' Equity has collective bargaining agreements with most major theatrical producers in New York and elsewhere, with most off-Broadway producers, and with many other theatrical producers throughout the United States. The terms negotiated with various producers groups are the minimum terms and conditions of employment. An actor is free to negotiate salary or terms more favorable than those prescribed in the collective bargaining agreement, but neither the actor nor the producer [nor the agent] is permitted to diminish the wages set forth in the relevant collective bargaining agreement.

Theatrical agents are independent contractors in the business of placing their actor clients in jobs with producers. Theatrical agents receive commissions, based on a percentage of earnings of the client, only if they succeed in obtaining employment for their clients.

Theatrical agents who operate in New York City [including all petitioners] are required to be licensed as employment agencies and are regulated by the Department of Consumer Affairs of New York City pursuant to Article 11 of the General Business Law of the State of New York, which sets the maximum commissions [10%] employment agencies may charge and has specific provisions[1] dealing with theatrical agents." (478 F.Supp. at 497, B2)

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[1] *See* §§180, 183 and 185 (Appendix G).

"At issue in this case is Equity's system of 'franchising' theatrical agents. Agents pay a fee and agree to abide by certain restrictions in return for certification as 'franchised' agents. Equity encourages agents to become franchised by forbidding its members to deal with unfranchised agents. Equity members who negotiate contracts using the services of unfranchised agents are subject to union discipline, including fines." (1980-2 CCH Trade Reg. Rep. at page 75,905, A1)

"In order to enforce its rule that members deal only through franchised agents, Actors' Equity has advised members that they could be disciplined for dealing with nonfranchised agents. It was Actors' Equity's practice to send a letter to an actor dealing with a nonfranchised agent, warning the actor that he could be disciplined—a copy of the letter was also sent to the nonfranchised agent. In 1979, Actors' Equity began disciplinary proceedings against members who were dealing with nonfranchised agents [such as petitioners]—members who would not agree to cease dealing with nonfranchised agents were fined after hearings." (478 F.Supp. at 499, B4)

"The most important of the restrictions placed upon franchised agents is the requirement that they renounce any right to take commissions on contracts under which an actor receives scale wages. Scale wages are set by a collective bargaining agreement between Equity and theatrical producers, to which the agents are not parties. To the extent that a contract includes provisions under which an actor will sometimes receive scale pay (as for rehearsal periods and 'chorus' employment) and sometimes more, the franchise regulations deny the agent any commission on the scale portions of the contract. Franchised agents are also precluded from taking commissions on certain expense

money paid to union members; commissions are limited on wages within 10% of scale pay; and agents must allow actors to terminate a representation contract if the agent is unsuccessful in procuring employment for the actor within a specified period of time." (1980-2 Trade Reg. Rep. at pages 75,905-6, A1-2)

Prior to October, 1977, Equity's franchising rules prohibited agents from charging commissions on most "scale" jobs. Thus, agents would receive no compensation if they obtained a job for an actor which paid the minimum or scale salary provided for in the collective bargaining agreements between Equity and the producers. In addition, Equity prohibited commissions on rehearsal pay, on pay for out of town expenses, and on "chorus" jobs. Moreover, the Union could unilaterally reclassify non-chorus jobs as chorus jobs.

In addition, agents are required to pay franchise fees to Equity. These fees are deposited by Equity in its general treasury and Equity makes no attempt to cost justify the amounts it charges as franchise fees. The franchise fees:

". . . are not segregated from other union funds. While the union argues that they are necessary to pay the union's expenses in administering the franchise system, no evidence was presented at trial to show that the union's costs justified the franchise fees." (1980-2 Trade Reg. Rep. at page 75,908, A4)

In October, 1977, Equity promulgated new Equity Agency Regulations. The new Equity Agency Regulations, *inter alia,* prohibit commissions on: all scale jobs, on chorus jobs, on rehearsal pay, and on out-of-town expense money. *In fact, the new regulations eliminated those limited areas in which commissions on scale were previously allowed* and, further, doubled the franchise fees. Due to their dissatis-

faction with the then proposed new Equity Agency Regulations, the Agents advised the Union that they "cannot in good conscience accept" the proposed new regulations. As a result, most of the Agents have remained unfranchised. Because of continuing pressure brought by the Union upon the Agents and their actor-clients (Union members who employ petitioners), the petitioners commenced this action in May, 1978 for injunctive relief only.

C. *Proceedings Below*

The complaint and the Agents' motion for a preliminary injunction prohibiting the Union and its members from boycotting the Agents during the pendency of this action were filed on May 26, 1978. The court below denied the motion for a preliminary injunction [Appendix D]. The Court of Appeals, in a memorandum opinion, affirmed [Appendix C]. The bench trial of the action commenced on June 21, 1979. On October 24, 1979, Judge Motley rendered her decision [Appendix B] dismissing the complaint. On May 23, 1980, in an opinion written by Judge Lumbard [Appendix A], the Court of Appeals affirmed.

Reasons For Granting the Writ

The decisions below should be reversed not merely because they are wrong—but because in this day and age they permit unions under the guise of compulsory franchising and licensing systems to absolutely and arbitrarily dominate, regulate and monopolize the business lives and careers of independent contractors who, as employment agencies, have their commissions and other facets of their business regulated by a state agency. These independent contractors are agents who are employed by and render services to union members, but are not union members and do not receive any union benefits.

In addition to Equity, many other talent unions such as American Federation of Musicians, Screen Actors Guild ("SAG"), American Federation of Television and Radio Artists ("AFTRA"), and the Writers Guild of America have compulsory franchising systems. As noted at page 9 of Equity's brief to the Court of Appeals, "Equity is only one of many talent unions which regulates talent agents." The importance to unions of this issue is underscored by the *amicus curiae* participation below of SAG and AFTRA who, with Equity, are affiliates of the AFL-CIO.

If the decisions below are allowed to stand, the delicate balance between conflicting federal labor and antitrust policies will be upset to the detriment of sound antitrust policy with no countervailing benefit to labor. In *Jou-Jou Designs Inc.* v. *ILGWU,* 1980-2 Trade Reg. Rep. ¶63,402 (S.D.N.Y.) at page 76,047, the court noted:

> "We are thus confronted, as many courts have been, with the interaction of antitrust policy and labor policy, expressed in statutes and Supreme Court decision. The accommodation between these policies, characterized by one commentator as 'intrinsically incompatible', presents 'a troublesome and unruly issue.' Commerce Tankers v. National Maritime Union of America, 553 F.2d 793, 801 (2d Cir. 1977), quoting Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws,* 32 U. Chi. L. Rev. 659 (1965)."

In "Consolidated Express: Antitrust Liability for Illegal Labor Activities," 80 Columbia L. Rev. 644 (April 1980), the author stated at page 644:

> "Courts have struggled for decades to resolve the clash between the procompetitive purposes of the antitrust laws and the anticompetitive impact of the labor laws."

In this regard, it should be noted that in most cases involving conflicts between federal labor and antitrust policies, the courts are concerned with the "congressional policy favoring collective bargaining" [*see, e.g., Connell Construction Co., Inc.* v. *Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616, 622 (1975); *Local Union No. 189, Amalgamated Meat Cutters & Butchers Workmen of North America AFL-CIO* v. *Jewel Tea Inc.,* 381 U.S. 676 (1965)], a concern which is not present here. If Equity is precluded from franchising agents, its collective bargaining agreements with producers will not be affected and the policies of economic freedom which support the antitrust laws will be furthered.

Stripped of the immunity provided by the holding below that agents are part of the labor group, the Union's franchising system violates the Sherman Act because:

A. it constitutes a group boycott which totally prevents the Agents from serving as agents for actors and forecloses them from competing with Union-franchised agents. *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.,* 364 U.S. 656 (1961); *Klor's, Inc.* v. *Broadway Hale Stores, Inc.,* 359 U.S. 207 (1959);

B. its regulation of agents' commissions constitutes both horizontal and vertical price fixing. *Albrecht* v. *The Herald Co.,* 390 U.S. 145 (1968); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.,* 220 U.S. 373 (1911); *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), *rehearing denied,* 423 U.S. 886 (1975);

C. it constitutes an agreement not to compete by horizontal competitors. *Interstate Circuit, Inc.* v. *U.S.,* 306 U.S. 208 (1939); *United States* v. *General Dyestuff Corporation,* 57 F.Supp. 642 (S.D.N.Y. 1944); *Duplan*

Corp. v. *Deering Milliken, Inc.*, 444 F.Supp. 648, 683-684 (D.S.C. 1977); and

D. it permits the Union to use its legal monopoly over the services of actors to illegally monopolize the business of rendering agency services to actors. *See Packaged Programs Inc.* v. *Westinghouse Broadcast Co., Inc.*, 255 F.2d 708, 710 (3rd Cir. 1958), and cases cited therein.

I.

The Courts Below Improperly Interpreted and Extended This Court's Decision in *Carroll*.

In holding that Agents were part of the Union's labor group, the courts below relied primarily on this Court's decision in *Carroll*. That reliance was error and improperly extended the *Carroll* holding which applied only to booking agents in the unique club date field to theatrical agents who operate under vastly different conditions.

The most unusual circumstance in *Carroll*, which makes it so different from the subject case, is the fact that *the union in Carroll, the American Federation of Musicians ("AFM"), did not have a collective bargaining agreement with the employers of its members* in the peculiar club date field. There were no collective bargaining agreements because of the unique nature of the diverse employers who employed club date musicians sporadically, sometimes only once in a lifetime and generally for non-business purposes, *e.g.*, the father of the bride. This is a rare situation since the primary purpose of unions is to negotiate collective bargaining agreements with the employers of its members, setting forth the minimum wage scales and working conditions of the Union's members. This should be contrasted

with the case at bar where the employers (theatrical producers) have formed associations for the sole purpose of negotiating collective bargaining agreements with Equity. Thus, unlike AFM, Equity has collective bargaining agreements with all producers who employ its members.

The uniqueness and peculiar facts of *Carroll* have not escaped the attention of commentators[2] or the courts. In *Home Box Office, Inc.* v. *Director's Guild of America, Inc.*, 83 F.R.D. 423, 425 (S.D.N.Y. 1979), the court, commenting upon defendants' reliance upon *Carroll*, noted:

> "But *American Federation of Musicians* v. *Carroll*, 391 U.S. 99 (1968), cannot confidently be read so broadly, given its special circumstances, especially the fact that the orchestra leaders there actually played as musicians with their dance bands. Furthermore, this Court, at least, lacks the confidence to apply a decision as unique and difficult as *Carroll* without the benefit of a full record, as Judge Levet insisted on having in *Carroll* itself."

In his dissent in *Carroll*, Justice White referred to "the peculiar role of bandleaders and the peculiar economics of the club-date music industry." 391 U.S. at 114.

At best, *Carroll* dealt only tangentially with the issue of union regulation of agents. In *Carroll*, the four plaintiffs were orchestra leaders and musicians who were members of AFM while competing with and hiring union member-musicians. Two of the four *Carroll* plaintiffs were also

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[2] *E.g.*, Bartosic, *The Supreme Court, 1974, Term*, 62 Va. L. Rev. 533, 593 n. 270 (1976); Case Notes, *Labor Law-Antitrust Liability of Labor Unions*, 15 B.C. Ind. Comm. L. Rev. 595, 606 (1974) ("it has been suggested that the holding in *Carroll* may be limited to the special employment conditions of the music industry"); and DiCola, *Labor Antitrust: Pennington, Jewel Tea and Subsequent Meandering*, 33 U. Pitt. L. Rev. 705, 747 (1972).

agents, but only to the limited extent that they booked jobs for their own orchestras. Accordingly, the primary issue and the focus in *Carroll* was plaintiffs' activities as orchestra leaders and not as booking agents. This is demonstrated by the Supreme Court's delineation of the issue in *Carroll*:

> "The question is whether union practices of the petitioners *affecting orchestra leaders* violate the Sherman Act as activities in combination with a 'non-labor' group, or are exempted by the Norris-LaGuardia Act as activities affecting a 'labor' group which is a party to a 'labor dispute' ". 391 U.S. at 101 (italics supplied).

In its opinion below, the Court of Appeals recognized that "the central holding" in *Carroll* "was that the fact that bandleaders sometimes performed as musicians meant that such [union] restrictions were valid. . . ." (1980-2 Trade Reg. Rep. at page 75,907, A3)

Despite the peripheral involvement of unlicensed part-time agents in *Carroll,* that decision has been indiscriminately extended to cases[3] which involved full time professional independent agents, a factual situation never considered in *Carroll.*

In *Carroll,* the Supreme Court approved the District Court's holding that the orchestra leader plaintiffs were parties to a "labor dispute" and were a "labor group" because of the "presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors." 391 U.S. at 106. The holding that there was an "economic interrelationship" between the members of AFM and its booking agents and the reasonable relation-

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[3] *See e.g., Adams Ray & Rosenberg* v. *William Morris Agency,* 411 F. Supp. 403 (C.D. Ca. 1976); and *Redfield* v. *AFM,* 603 F.2d 214 (2d Cir. 1979).

ship between the licensing of agents and AFM's "interest in maintaining observance of union scale wages and working conditions" was predicated upon the following findings of facts, *none of which are present in the instant case:*

1. In *Carroll,* the AFM did not have a collective bargaining agreement with the employers (*e.g.,* the father of the bride) who hired its members. Accordingly, if AFM were to enforce its unilaterally imposed minimum wage scales, it had to do so through its members and through direct vertical regulation of the booking agents. Here, where the Union has entered into collective bargaining agreements with the employers (producers) who directly pay Union members, there is no such need or justification.

2. In *Carroll,* where there was no collective bargaining agreement between the Union and the employers, this Court held that AFM's fixing the minimum prices which orchestra leaders could charge was justified by a specific "finding that the requirement is necessary to assure that scale wages will be paid to the sidemen and the leader." 391 U.S. at 112.

> "There was evidence that when the leader does not collect from the purchaser of the music [employer] an amount sufficient to make up the total of his out-of-pocket expenses, including the sum of his wage-scale wages and the scale wages of the sidemen, he will, in fact, not pay the sidemen the prescribed scale." *Id.* at 111.

In stark contrast, the courts below could not, and indeed did not, find that Union members were not paid scale wages or were in danger of not being paid scale wages. There was undisputed evidence that:

> A. producers must pay scale wages to Union members pursuant to collective bargaining agreements between the Union and producers;

B. producers must post a bond guaranteeing the payment of scale wages to Union members; and

C. unlike *Carroll,* where the employers paid the booking agents who in turn paid the union members, *here the producers pay the actors directly.* Despite Union allegations that actors needed protection from their agents, *there is no evidence that any Union member who used an agent was ever paid less than scale or minimum.*

In view of the above, the District Court's holding that the "franchising of agents . . . operate[s] to protect wage scales" (478 F.Supp. at 504, B9) is without substantiation and is clearly erroneous.

3. In *Carroll,* there was a specific finding:

"that the booking agent regulations were adopted because of experience that [A] many booking agents charged exorbitant fees to members and [B] booked engagements for musicians at wages which were below union scale.'" *Id.* at 113.

Again for the reasons noted in "2", *supra,* the court below did not find that the petitioners or other agents "booked engagements for" Union members "at wages which were below union scale". Similarly, the court below did not find that "many" theatrical "agents (or even one) charged exorbitant fees to" Union members, because there is no evidence that:

A. any petitioner or any other agent charged an exorbitant commission[4] to any Union member or anyone else; or

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[4] Since the booking agents were allowed to charge 15% commissions in *Carroll* (241 F. Supp. at 881), by using the term "exorbitant" the Court was obviously referring to commissions in excess of 15%.

B. any Agent charged a Union member a commission in excess of the 10% commission permitted by Article 11 of the General Business Law.

Because of the above, the Court of Appeals holding that the regulation of theatrical agents is justified by the *"possibility* that job-hungry actors will work through agents who take excessive commissions" (1980-2 Trade Reg. Rep. at page 75,908, A4) (emphasis supplied), can only be characterized as speculative and therefore is clearly erroneous.

4. In *Carroll,* the booking agents were not licensed nor were their commissions or any other facet of their business regulated by any government agency. Therefore, the vertical licensing of unregulated agents upheld in *Carroll* reflected a proper balance between the conflicting interests of federal labor and antitrust policies. Here, where theatrical agents are already regulated, a franchising system such as Equity's does not protect or further any legitimate union interest and contravenes established antitrust policy.

II.

Carroll, as Applied to Agents, Should Be Overruled.

If this Court finds that the courts below have properly extended the *Carroll* holding in the unique club date field to theatrical agents, thereby seriously upsetting the judicial balance between conflicting antitrust and labor policies, then *Carroll* should be overruled as it applies to agents to restore this balance. The following quotations from Justice White's dissent in *Carroll* are particularly appropriate today in view of the decisions below:

"In my view the Court is misled by the peculiar role of bandleaders and the peculiar economics of the club date

music industry, and fashions a rule which, if comprehensible at all, has unfortunate consequences for the delicate and difficult area of conflict between antitrust and labor policy." (391 U.S. at 114).

"It may be that the Court views this industry as having special problems of supply and demand requiring special treatment under the antitrust laws. If this is the case, the Court should frankly say so and seek to confine the misguided rules of law it announces." (391 U.S. at 121).

III.

The Courts Below Improperly Extended *Carroll* to Permit Unions to Require Agents to Work For Nothing.

If this Court were to affirm that portion of the opinions below which justify the "regulation of the fees of agents" on the ground that "the union cannot eliminate wage competition among its members without" such regulation (1980-2 Trade Reg. Rep. at page 75,907, A3), it should nevertheless grant certiorari for the purpose of holding that the regulation of maximum fees does not permit unions to require agents to render their services to union members for nothing on scale or minimum or any other jobs.[5] No citation is required for the proposition that the power to tax is the power to destroy. Agents are forced to work for nothing when they obtain a scale job for a client even though they sought a higher wage for the client in negotiations with the producer. In view of agents' self-interest in obtaining the highest possible wages for actor-clients, there can be no justification for the Union's prohibition of com-

[5] In some circumstances scale or minimum wage may be as high as $600 per week.

missions on scale jobs. Moreover, agents' commissions are regulated by Article 11 of the General Business Law and there is no evidence that agents collect commissions which violate Article 11. Accordingly, no justification has been shown to substitute the Union's desire to impose onerous and self-serving restrictions on agents' commissions for the wisdom of the New York State Legislature in permitting theatrical agents to charge a ten percent commission under Article 11 of the General Business Law.

If the courts below are upheld, the Union might, and could lawfully the day after this Court's decision, require agents to work for no commission on jobs which pay $1000 a week or more. Where, as here, agents are forced to work for nothing, the Union is not protecting its members from agents but instead is requiring agents to subsidize Union members.

IV.

The Courts Below Improperly Extended *Carroll* to Permit Unions to Extract Franchise Fees From Compulsorily Franchised Agents For the Privilege of Being Regulated and Dominated by the Union.

Not content with regulating the commissions that agents charge Union members and with regulating the manner in which agents may operate their business, the Union requires agents to pay franchise fees for the privilege of being regulated, dominated and required to work for nothing. *No court, not even Carroll, prior to the decisions of the court below, has ever held that a union may extract franchise fees from independent agents who represent union members.* In *Carroll*, the union did not extract franchise fees from the agents it regulated. 241 F.Supp. at 881.

The Court of Appeals, while recognizing that franchise fees is a "troublesome" area, appears to have assumed without explanation that the Union may impose upon agents the "union's expenses in administering the franchising system" it forces upon unwilling agents. 1980-2 Trade Reg. Rep. at 75,908, A4. (1980-2 Trade Reg. Rep. at page 75,907, A3), it should

The Union's requirement that agents must pay a franchise fee in order to represent actor-members of the Union on the Union's terms and conditions does not constitute protection of wage scales—but again amounts to the agents' forced subsidization of Union members. The more franchise fees extracted from agents, the less dues Union members must pay to Equity. If Equity (like the AFM in *Carroll*) did not charge any franchise fees, the wage scales Equity negotiates with producers for the benefits of Equity's members would remain unchanged. Accordingly, there is no basis for Judge Motley's "opinion that the franchise fees are reasonably related to the operation of the franchise system and the system's protection of wage scales and working conditions." 478 F.Supp. at 504, B9.

CONCLUSION

If the decisions below are allowed to stand, agents will be permanent members of unions' "labor group" and thus subject to union domination and regulation without the protection of the antitrust laws or the benefits of union membership and will be compelled to pay a franchise fee to remain in this unfortunate condition.

Dated: New York, New York
August 19, 1980

Respectfully submitted,

CHARLES DONELAN, ESQ.
311 Main Street
Worcester, Mass. 01608
(617) 791-3511

HOWARD BREINDEL, ESQ.
530 Fifth Avenue
New York, New York 10036
(212) 221-3760

Of Counsel:

BOWDITCH & DEWEY
SOLIN & BREINDEL, P.C.

APPENDIX

APPENDIX A
DECISION OF SECOND CIRCUIT AFFIRMING DISRICT COURT'S DECISION TO DISMISS THE COMPLAINT.

[¶ 63,376] H. A. Artists & Associates, Inc., et al. v. Actors Equity Association and Donald Grody.

U. S. Court of Appeals, Second Circuit. Docket No. 79-7821. No. 875, September Term, 1979. Decided May 23, 1980. Appeal from dismissal of a complaint by theatrical agents against actors' union, alleging antitrust violations. 478 F. Supp. 496 (S. D. N. Y. 1979) (Motley, J.), affirmed.

Sherman Act

Labor Unions—Antitrust Immunity—System of Franchising Theatrical Agents—Combination with Non-Labor Group.—An actors union's system of franchising theatrical agents whereby agents paid a fee and agreed to abide by restrictions in return for certification as franchised agents was immune from antitrust scrutiny under the statutory labor law exemption. Collective bargaining agreements did not reveal any combination between the union and theatrical producers, a "non-labor group", that would divest the union's franchise system of the protection of the statutory exemption. Unilateral statements made by the union that only franchised agents may negotiate employment for performers were not proof of an agreement because they only meant that union members were forbidden from dealing with unfranchised agents; there was no indication that producers agreed to cooperate or that they accepted the union's view. Any combination between the union and agents who agreed to become franchised did not have any effect as to the exemption because those agents were a "labor group". Moreover, the goal pursued by the franchising system through agent restrictions—mainly a non-charge of commission on scale wage contracts—was the protection of a minimum wage in the industry which was within the area of the union's legitimate self-interest. See ¶ 5415, 5435.

For plaintiffs-appellants: Howard Breindel, Worcester, Mass. (Bowditch & Dewey, Worcester, Mass., Solin & Breindel, New York, N. Y., of counsel). **For defendants-appellees:** Nan Bases, New York, N. Y. (Cohn, Glickstein, Lurie, Ostrin, Lubell & Lubell, New York, N. Y., of counsel). For amicus curiae: Shea & Gould, New York, N. Y., for Screen Actors Guild, Inc.; Mortimer Becker, New York, N. Y. (Van Arkel, Kaiser, Gressman, Rosenberg and Driesen, Washington, D. C., of counsel), for American Federation of Television and Radio Artists.

Before: LUMBARD, MANSFIELD, Circuit Judges and BARTELS, District Judge.*

[Opinion]

LUMBARD, Cir. J.: Appellants, theatrical agents who act as intermediaries between actors and producers, appeal from a judgment of the District Court for the Southern District of New York, 478 F. Supp. 496 (1979) (Motley, J.), holding certain practices of defendant union Actors Equity ("Equity") immune from challenge under the antitrust laws because protected by the "statutory labor exemption." We affirm.

[System of Franchising Theatrical Agents]

At issue in this case is Equity's system of "franchising" theatrical agents. Agents pay a fee and agree to abide by certain restrictions in return for certification as "franchised" agents. Equity encourages agents to become franchised by forbidding its members to deal with unfranchised agents. Equity members who negotiate contracts using the services of unfranchised agents are subject to union discipline, including fines.

[Agent Restrictions]

The most important of the restrictions placed upon franchised agents is the requirement that they renounce any right to take commissions on contracts under which an actor receives scale wages. Scale wages are set by a collective bargaining agreement between Equity and theatrical producers, to which the agents are not parties. To the extent that a contract includes provisions under which an actor will sometimes receive scale pay (as for rehearsal periods and "chorus" employment) and sometimes more, the franchise regulations deny the agent any commission on the scale portions of the contract. Franchised agents are also precluded from taking commissions on certain expense money paid to union members; commissions are limited on wages within 10% of scale pay; and

* Hon. John R. Bartels, United States District Judge for the Eastern District of New York, sitting by designation.

agents must allow actors to terminate a representation contract if the agent is unsuccessful in procuring employment for the actor within a specified period of time.

Some theatrical agents find this system acceptable, and this group—which has formed a trade association called TARA—is not a party in this litigation.

The district court did not reach the question of whether or not the franchise system is an unreasonable restraint of trade, or constitutes *per se* illegal price-fixing, because it found that the union's actions in creating and maintaining the franchise system were fully protected by the "statutory" labor exemption from the antitrust laws, which removes from antitrust scrutiny unilateral action by a labor union pursuing the interests of its members. The "statutory" exemption has its source in judicial readings of sections 6 and 20 of the Clayton Act, 15 U. S. C. §§ 17, 29, and of the Norris-LaGuardia Act, 29 U. S. C. §§ 105-115. Under the leading "statutory" labor exemption case of *United States v. Hutcheson* [1940-1943 TRADE CASES ¶ 56,091], 312 U. S. 219 (1941), the threshold issue is whether or not Equity's franchising of agents has involved any combination between Equity and any "non-labor groups" or persons who are not "parties to a labor dispute." *Id.* at 232. If it has, the protection of the exemption does not apply.[1]

[Combination with Non-Labor Group]

Most employers qualify as a "non-labor group,"[2] and the court below considered whether or not there was any agreement, either explicit or tacit, between Equity and the producers to establish or police the franchise system. We do not believe the district court was clearly erroneous in finding that the collective bargaining agreement does not reveal any combination between Equity and the producers with respect to agents, Fed. R. Civ. P. 52(a), *Meat Cutters v. Jewel Tea Co.* [1965 TRADE CASES ¶ 71,463], 381 U. S. 676, 694 (1965).

Appellants argue that the provision in the collective bargaining agreement that standard employment contracts include a space for the actor's agent's name, and another provision of the agreement that requires this line to be filled in, is evidence that the producers agree with Equity to help the union police its franchise system. We disagree. As the district court found, there was evidence that contracts were often executed leaving blank the line left for the agent's name, and that, even so, Equity honored such contracts and did not take any action against members who worked under such contracts. The provision requiring that every line be filled in far antedated the appearance of the line for "name of agent." The district court was not clearly erroneous in concluding that Equity did not in fact require that this line be filled in.

The collective bargaining agreement aside, appellants argue that various statements made by Equity officials to union members and to producers are evidence of a combination between Equity and the producers with regard to agent franchising. We have examined each of the statements in the record adduced to support this point and we conclude that the district court's finding that they do not demonstrate any such combination cannot be labeled clearly erroneous. Unilateral pronouncements by Equity such as that "only franchised agents may negotiate employment deals for Equity performers" are not proof of an agreement because they may mean no more than that Equity members are forbidden from dealing with unfranchised agents. Such a prohibition, of course, since it serves the union's self-interest in a matter of proper union concern and does not involve a non-labor group, is safe from antitrust scrutiny under the statutory exemption. *United States v. Hutcheson, supra.*

There is some evidence in the record that Equity sought the producers' cooperation in enforcing the franchise system during the 1975 negotiations between Equity, TARA and the producers. And Equity officials did tell their membership that producers had an "obligation" to avoid using unfranchised agents. But such unilateral expressions, in the absence of any indication from the producers that they had agreed to cooperate or that they had accepted Equity's view of their "obligations," is not

[1] If a court finds that there has been an agreement between a union and a "non-labor group", the agreement may still be entitled to antitrust immunity under the "non-statutory" exemption. *Connell Construction Co. v. Plumbers Local 100* [1975-1 TRADE CASES ¶ 60,341], 421 U. S. 616, 622 (1975). Since both the "statutory" and "non-statutory" exemptions are based on judicial readings of the Sherman, Clayton and Norris-LaGuardia Acts, this choice of terminology seems unfortunate. See I Areeda & Turner, *Antitrust* (1978) § 229 at 192.

[2] An exception is an employer in job competition with his employees, e. g., a bandleader who sometimes both leads a band and plays an instrument. *American Federation of Musicians v. Carroll* [1968 TRADE CASES ¶ 72,456], 391 U. S. 99 (1967).

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evidence from which the court was required to find that a "combination" had been formed. Our conclusion is also based on the fact that there was no evidence at trial that any producer had considered himself bound by the union's statements; nor did any producer testify that he had been pressured not to deal with unfranchised agents, or that he had reported unfranchised agents to the union.

[Franchised Agents as Labor Group]

But on the record in this case we discern a combination between the union and individuals who appear as if they might be members of a "non-labor" group. These individuals are those agents who have agreed with the union to become franchised, and these agreements must be scrutinized to determine if they are agreements that would divest Equity's franchise system of the protection of the "statutory" exemption. In our view, they do not because the agents involved are a "labor group."

In *American Federation of Musicians v. Carroll* [1968 TRADE CASES ¶72,456], 391 U. S. 99 (1967), the Supreme Court identified the test for distinguishing a labor group from a non-labor group as ". . . the presence of job or wage competition or some other economic inter-relationship affecting legitimate union interests between the union members and the independent contractors. If such a relationship existed, the independent contractors were a 'labor group' . . . " 391 U. S. at 106, quoting [1965 TRADE CASES ¶71,546], 241 F. Supp. at 887. The above language is taken from the *Carroll* court's discussion of whether or not bandleaders in the "club date" field could be subjected to certain forms of union restrictions. Since the central holding in the case was that the fact that bandleaders sometimes performed as musicians meant that such restrictions were valid, most of the opinion deals with the "job or wage competition" branch of the disjunctive test quoted above. But the *Carroll* court also approved the musicians' union's restrictions on booking agents' commissions, which were enforced through a "licensing" system analogous to the "franchising" system at issue in the case at bar. 391 U. S. at 116-17.

Unlike the bandleaders, the agents in *Carroll* were not in any kind of "job or wage competition" with union members. The court's *sub silentio* application of the statutory exemption therefore supports the view that the musicians and the booking agents were in a sufficient "economic interrelationship" to justify union regulation. Because of the vagueness of this term, however, we believe the matter calls for further explanation.

Most unions are in an "economic interrelationship" with the employers of their membership. When the union gains a wage increase, the employers give up corresponding amounts of money (though not necessarily corresponding profits, because labor costs can often be passed along to consumers). But such an "economic interrelationship" does not suffice to make an employer a "labor group", or even a "party to a labor dispute"; otherwise there would be no need for the "non-statutory" exemption, which was developed largely to provide an exemption for union agreements with employers. *Connell Construction Co. v. Plumbers Local 100* [1975-1 TRADE CASES ¶60,341], 421 U. S. 616, 622 (1975). To choose a different example, there is an "economic interrelationship" between a labor union and the buyers of goods produced by the union members' employer. If, for example, steelworkers were to win a wage raise of enormous size, various users of steel products, such as automobile manufacturers, would be adversely affected. Yet a combination between the steelworkers and an automobile manufacturer would not be entitled to the benefit of the statutory exemption because of this "economic interrelationship."

For purposes of this case, it is enough to note that the "economic interrelationship" test has never been used to immunize from antitrust challenge anything more than a union's effort to regulate parties, who, because of industry structure, stand athwart the current of wages paid by employers to union members; and that these efforts have been associated with attempts to defend the integrity of *minimum* wages. See, e. g., *Adams, Ray & Rosenberg v. William Morris Agency*, 411 F. Supp. 403 (C. D. Cal. 1976). In industries where it is necessary or customary for union members to secure employment through agents, and agents' fees are calculated as a percentage of wages set by a collective bargaining agreement, such agents must be considered a "labor group" because the union cannot eliminate wage competition among its members without regulation of the fees of the agents.

[Legitimate Labor Goal]

Once it is determined that the union's actions have involved no combination with

a non-labor group, it remains, under *United States v. Hutcheson, supra*, only to decide if the goal being pursued in within the area of the union's legitimate self-interest. In the case at bar, Equity, through its franchising system, seeks primarily to protect from encroachment a minimum wage in an industry where the maintenance of a minimum wage poses problems of particular intractability. The possibility that job-hungry actors will work through agents who take excessive commissions is a matter of legitimate union concern. The goal of the agent restrictions is the elimination of wage competition, traditionally one of the most sacrosanct goals of national labor policy.

To this point, we have been concerned with the core of Equity's franchising system —the securing by the union of an agreement from the agents not to charge commissions on certain types of work obtained. A second aspect of the franchising system, under which the union charges a fee to agents who become franchised, is more troublesome. These fees ($200 for the initial franchise; $60 per year thereafter for each agent, and $40 for any sub-agent working in the office of another), are not segregated from other union funds. While the union argues that they are necessary to pay the union's expenses in administering the franchise system, no evidence was presented at trial to show that the union's costs justified the franchise fees.

Clearly the union could not, legally, exact more from the agents than it needs to offset the costs of the franchising system. Such exactions would be unconnected with any of the goals of national labor policy which justify the antitrust exemption for labor. Nevertheless, this case in its present posture can best be disposed of by approving the fees as they stand today. There was testimony that at least one full-time Equity employee was engaged in updating lists of franchised agents and correlating contracts with these lists. There was also testimony that approximately 200 theatrical agents or agencies are affected by the union practices under challenge. Assuming an average yearly charge of $60, Equity's franchising revenues would amount to approximately $12,000. Such a sum, plus initial franchise fees collected during the year, cannot be incommensurate with Equity's expenses in maintaining a full-time employee to administer the system. In such circumstances, a remand to the district court would not serve any useful purpose.

Affirmed.

APPENDIX B
DISTRICT COURT OPINION DISMISSING THE COMPLAINT

H. A. ARTISTS & ASSOCIATES, INC., S. T. E. Representation, Ltd., Don Buchwald & Associates, Inc., Marje Fields, Inc., Henderson/Hogan Agency, Inc., Joel Pitt, Ltd., Talent Representatives, Inc., D. M. L. Talent Associates, Ltd., Jean Thomas Agency, Inc., Bob Waters, Inc., William D. Cunningham & Associates, Inc., Tatrum, Robertson & Hughes, Inc., Monty Silver Agency, Inc., Lester Lewis Associates, Inc., Leaverton Associates, Ltd., Joe Jordan Talent Agency, Inc., Raglyn-Shamsky, Ltd., Ann Wright Representatives, Inc., Plaintiffs,

v.

ACTORS' EQUITY ASSOCIATION, an unincorporated association and Donald Grody, Defendants.

No. 78 Civ. 2452.

United States District Court, S. D. New York.

Oct. 24, 1979.

Employment agencies operating as theatrical agents brought suit against a labor organization representing actors working in the legitimate theater, contending that the

2. This is not the situation which the Supreme Court addressed in *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978), and that case is therefore inapposite.

labor organization's franchising system and collective bargaining agreements violated the Sherman Anti-Trust Act. The District Court, Motley, J., held that the conduct in question was protected under a statutory exemption to the antitrust laws applying to union activities.

Complaint dismissed.

Monopolies ⇐12(8)

Where, in adopting franchising system and collective bargaining agreements, labor organization representing actors working in legitimate theater acted in its own self-interest concerning matters intimately bound with wage scales and working conditions, and acted without conspiring or combining with any nonlabor group, such activities were protected by statutory exemption from antitrust laws for union activities. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 6, 15 U.S.C.A. § 17; § 20, 29 U.S.C.A. § 52; Norris-LaGuardia Act, §§ 1–15, 29 U.S.C.A. §§ 101–115; General Business Law N.Y. § 170 et seq.

Solin & Breindel by Howard Breindel, Frederick Gold, New York City and Bowditch & Dewey by Charles Donelan, Worcester, Mass., for plaintiffs.

Cohn, Glickstein, Lurie, Ostrin & Lubell by Nan C. Bases, Mary K. O'Melveny, New York City, for defendants.

FINDINGS OF FACT

MOTLEY, District Judge.

Defendant Actors' Equity Association ("Actors' Equity") is a labor organization representing actors working in the legitimate theatre. Defendant Donald Grody ("Grody"), as Executive Secretary, is the chief executive officer of Actors' Equity. The plaintiffs are employment agencies located in New York City who operate as theatrical agents.

Actors' Equity has collective bargain agreements with most major theatrical producers in New York and elsewhere, with most off-Broadway producers, and with many other theatrical producers throughout the United States. The terms negotiated with various producer groups are the minimum terms and conditions of employment. An actor is free to negotiate salary or terms more favorable than those prescribed in the collective bargaining agreement, but neither the actor nor the producer is permitted to diminish the wages set forth in the relevant collective bargaining agreement.

Theatrical agents are independent contractors in the business of placing their actor clients in jobs with producers. Theatrical agents receive commissions, based on a percentage of earnings of the client, only if they succeed in obtaining employment for their clients.

Theatrical agents who operate in New York City are required to be licensed as employment agencies and are regulated by the Department of Consumer Affairs of New York City pursuant to Article 11 of the General Business Law of the State of New York, which sets the maximum commissions employment agencies may charge and has specific provisions dealing with theatrical agents.

As a matter of general industry practice, producers seek actors and actresses for their productions through agents. Testimony in this case convincingly established that an actor without an agent does not have the same access to producers or the same opportunity to be seriously considered for a part as does an actor who has an agent. Even principal interviews, in which producers are required to interview all actors who want to be considered for principal roles, do not eliminate the need for an agent, who may have a greater chance of gaining an audition for his client.

Under Actors' Equity agency regulation system, agents are required to secure licenses, also known as permits or franchises, from Actors' Equity in order to represent Actors' Equity members. Licensed agents must abide by a schedule of maximum commissions established by Actors' Equity and must adhere to other rules designed to pro-

tect Actors' Equity members. Actors' Equity members are forbidden from dealing through agents who are not licensed by Actors' Equity, and members are subject to discipline for dealing with nonfranchised agents.

Theatrical Artists Representatives Association ("TARA") is a trade association of agents working in the legitimate theatre field. Discussions between Actors' Equity and TARA have resulted in several revisions in Actors' Equity regulations over the years. While holding an Actors' Equity franchise is a condition of membership in TARA, membership in TARA is not a condition to obtaining an Actors' Equity franchise.

Discussions between Actors' Equity and TARA in the 1950's resulted in the promulgation by Actors' Equity of "Rule A," which governed relations between Actors' Equity members and theatrical agents between 1958 and 1977. Rule A prescribed the minimum terms of contracts between actors and agents, including the maximum commissions which could be charged, the maximum duration for exclusive contracts, and the conditions warranting release from an exclusive contract. Rule A also established procedures for the granting of franchises, the discipline of agents, and the arbitration of disputes under the agency regulations.

The current Actors' Equity agency regulations also resulted from discussions between Actors' Equity and TARA. The course of these discussions and related events follows.

Discussions between Actors' Equity and representatives of TARA commenced in or about 1975. In the course of the discussions, TARA gave six months notice to "terminate" Rule A; this termination date was extended several times by mutual consent.

A major subject of the discussions was Rule A's provision prohibiting agents from charging commissions on jobs paying the minimum scale salary provided for in the collective bargaining agreements between Actors' Equity and the producers. In addition, Rule A prohibited commissions on rehearsal pay, on pay for out of town expenses, and on "chorus" jobs. TARA demanded "10% from the first dollar," that is, a 10% commission on all monies received by the actor, regardless of whether the actor's salary exceeded the minimum scale. When Actors' Equity submitted to TARA a proposal that, while increasing commissions, did not meet this demand, TARA rejected the proposal and officially terminated Rule A on January 6, 1977. Agents who "resigned" their franchises pursuant to TARA's termination of Rule A were not permitted to represent Actors' Equity members except under pre-existing agency contracts. Rule A remained in effect for those agents who agreed to abide by it—these agents were permitted to represent Actors' Equity members for all purposes.

As negotiations continued, Actors' Equity drafted a revised commission schedule and new agency regulations, known as the "Equity Agency Regulations." These regulations provided that an agent could charge a 10% commission, so long as that commission did not invade the negotiated minimum, that an agent could charge a commission on off-Broadway contracts, and that expense money negotiated by Actors' Equity was not commissionable.

In May, 1977, seven agents, including five who are plaintiffs herein, filed a lawsuit in the United States District Court for the Southern District of New York, challenging Actors' Equity's franchising system under the antitrust laws (*Hidden v. Actors' Equity Association*, 77 Civ. 2624 (JMC)). The lawsuit was initiated and financed by TARA.

The lawsuit was withdrawn without prejudice in August, 1977, and in or about October, 1977, TARA and Actors' Equity reached agreement on the new Equity Agency Regulations. Most agents then resumed their franchises and began complying with the current Equity Agency Regulations. The new Equity Agency Regulations prohibit commissions on minimum scale jobs, chorus jobs, rehearsal pay, and out-of-town expense money. B3

On or about August 31, 1977, a group of agents, including the plaintiffs, informed Actors' Equity that they had resigned from TARA and that they wished to be represented by the National Association of Talent Representatives, Inc. (NATR), a trade association whose members were talent agents representing actors. Most of the plaintiffs have not been franchised by Actors' Equity since January, 1977. Actors' Equity has invited plaintiffs to become refranchised, but plaintiffs have decided to remain unfranchised.

In order to enforce its rule that members deal only through franchised agents, Actors' Equity has advised members that they could be disciplined for dealing with nonfranchised agents. It was Actors' Equity's practice to send a letter to an actor dealing with a nonfranchised agent, warning the actor that he could be disciplined—a copy of the letter was also sent to the nonfranchised agent. In 1979, Actors' Equity began disciplinary proceedings against members who were dealing with nonfranchised agents—members who would not agree to cease dealing with nonfranchised agents were fined after hearings.

The court finds, however, that Actors' Equity has not required producers to refrain from dealing with nonfranchised agents. While Actors' Equity requested producers not to deal with nonfranchised agents and notified producers that Actors' Equity members could be disciplined for dealing with nonfranchised agents, Actors' Equity never imposed or threatened to impose any sanctions on producers for dealing with nonfranchised agents. In June, 1978, Actors' Equity amended the language of Rule 2(A) in collective bargaining agreements between Actors' Equity and producers; the amendment clarified that actors were the only persons subject to any sanctions for dealing with nonfranchised agents.

Actors' Equity provides standard form individual employment contracts, which the actor and producer must sign when the actor becomes employed by a producer. These individual employment contracts provide blanks for identifying the parties to the contract (including the agent), the production, and essential terms such as the salary, the starting date, and the role to be played. In particular, in 1975 TARA requested Actors' Equity to add a line for identification of the agent into the standard form employment contract used under the "Production Contract" and used in Broadway shows. In 1977, Actors' Equity did print new standard form employment contracts containing a line for identification of the agent.

This court finds that producers were not, in fact, required to fill in the agent identification line on any of the standard form contracts. Producers could leave the agent's line blank, incurring no penalties or further inquiry from Actors' Equity. Even where Actors' Equity has had knowledge that a producer has failed to identify an agent on the standard form employment contract, the evidence does not show that Actors' Equity has taken action against the producer. In fact, producers have frequently not identified nonfranchised agents on the contract, at the request of the agents.

In short, this court finds no evidence to suggest the existence of any conspiracy or illegal combination between Actors' Equity and TARA or between Actors' Equity and producers. The Actors' Equity franchising system was employed by Actors' Equity for the purpose of protecting the wages and working conditions of its members.

CONCLUSIONS OF LAW

Plaintiffs in this case allege that defendant Actors' Equity Association's ("Actors' Equity") franchising system and collective bargaining agreements violate Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 et seq. Defendants have raised the affirmative defense that defendants' conduct is protected under the statutory and nonstatutory exemptions to the antitrust laws. For the reasons stated below, this court concludes that defendants' conduct is protected under the statutory exemption to the antitrust laws, and accordingly, finds for defendants in this case.

Under Sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17, 29 U.S.C. § 52, and under the Norris-LaGuardia Act, 29 U.S.C. §§ 101–115, labor unions are not combinations or conspiracies in restraint of trade; these statutes exempt specific union activities, including secondary picketing and boycotts, from operation of the antitrust laws. *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621–22, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975). Under this statutory exemption from antitrust laws, the Supreme Court held in *United States v. Hutcheson*, 312 U.S. 219, 232, 61 S.Ct. 463, 466, 85 L.Ed. 788 (1941) [footnote omitted], that the activities of a labor organization come within the exemption "[s]o long as a union acts in its self-interest and does not combine with non-labor groups."

In addition, the Supreme Court has fashioned a nonstatutory labor exemption from antitrust laws:

> The Court has recognized . . . that a proper accommodation between the congressional policy favoring collective bargaining under The NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions. . . .
>
> The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions.

Connell Construction Co. v. Plumbers & Steamfitters, supra, 421 U.S. at 622, 95 S.Ct. at 1835 [citation omitted]. B5

In distinguishing between the statutory and nonstatutory exemptions, the Supreme Court has noted that "while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, . . . the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market." *Id.* at 622–23, 95 S.Ct. at 1835 [citation omitted].

This court need not decide whether the nonstatutory exemption is applicable in the case at hand, as this court concludes that the statutory exemption is directly applicable. In particular, this court concludes that under the Supreme Court's decision in *American Federation of Musicians v. Carroll*, 391 U.S. 99, 88 S.Ct. 1562, 20 L.Ed.2d 460 (1968), the activities of the defendants are protected under the statutory exemption to antitrust laws.

As noted above, the Court in *United States v. Hutcheson* established a two pronged test for determining whether a labor organization's activity falls within the statutory exemption: 1) whether a union has combined with nonlabor groups, and 2) whether a union has acted in its self-interest. *See United States v. Hutcheson, supra*, 312 U.S. at 232, 61 S.Ct. 463. As interpreted by the Second Circuit, "[t]he test of whether labor union action is or is not within the prohibitions of the Sherman Act is (1) whether the action is in the union's self-interest in an area which is a proper subject of union concern and (2) whether the union is acting in combination with a group of employers." *Intercontinental Container Transport Corp. v. New York Shipping Assoc.*, 426 F.2d 884, 887 (2d Cir. 1970); *accord, Robertson v. National Basketball Assoc.*, 389 F.Supp. 867, 889 (S.D.N.Y.1975).

In *American Federation of Musicians v. Carroll, supra*, the Supreme Court introduced an "economic interrelationship" criterion in determining whether a union has combined with nonlabor groups—the first prong of the *Hutcheson* test:

> The criterion applied by the District Court in determining that the orchestra leaders were a "labor" group and parties

to a "labor dispute" was the "presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors. If such a relationship existed the independent contractors were a 'labor group' and party to a labor dispute under the Norris-LaGuardia Act." . . . The Court of Appeals held, and we agree, that this is a correct statement of the applicable principles.

391 U.S. at 105–06, 88 S.Ct. at 1567 [citation omitted]. The Supreme Court in *Carroll* found that the economic interrelationship criterion had been satisfied, in light of the district court's finding that "the orchestra leaders performed work and functions which actually or potentially affected the hours, wages, job security, and working conditions of [the union's] members." *Id.* at 106, 88 S.Ct. at 1567 [footnote omitted].

The Court in *Carroll* specifically addressed the applicability of the "economic interrelationship" criterion to the union's regulation of booking agents:

We think also that the caterer and booking agent restrictions "are at least as intimately bound up with the subject of wages," . . . as the price floors. The District Court found that the booking agent regulations were adopted because of experience that "many booking agents charged exorbitant fees to members and booked engagements for musicians at wages which were below union scale." . . . On the basis of these findings, the District Court concluded:

"Because the activities of the booking agents here have and had a direct and substantial effect on the wages of the members of [the unions], I find that they are in an economic interrelationship with the members * * * such that the [unions] are justified in regulating their activities * * *. Furthermore, I find the regulations to be reasonably related to their interest in maintaining observance of union scale and working conditions." . . .

Id. at 113, 88 S.Ct. at 1571 [bracketed material in original].

In applying the second prong of the *Hutcheson* test, the Court did not specifically inquire whether the union's activity was in its own "self-interest." Instead, the *Carroll* Court appeared to use several interchangeable tests to determine whether the union's activity actually protected the wages, hours, or working conditions of union members. *See Adams, Ray & Rosenberg v. William Morris Agency*, 411 F.Supp. 403, 409–10 (C.D.Cal.1976). Thus, the Court seemingly applied the following tests:

1) whether "the union has a legitimate interest" (391 U.S. at 107, 88 S.Ct. at 1568);

2) whether the activities "in actuality operate to protect the wages" (*Id.* at 108, 88 S.Ct. at 1568);

3) whether the activities "were expressly designed to and did function as a protection of * * * wage scales" (*Id.* at 108, 88 S.Ct. at 1568);

4) whether the activities "are simply a means for coping with the job and wage competition . . . to protect the wage scales" (*Id.* at 109, 88 S.Ct. at 1569);

5) whether the activities bear "a close relation to labor's efforts to improve working conditions" (*Id.*);

6) whether the activities are "a direct and frontal attack upon a problem thought to threaten the maintenance of the basic wage structure" (*Id.* at 110, 88 S.Ct. at 1569);

7) whether the activities are "intimately bound up with the subject wages" (*Id.* at 113, 88 S.Ct. at 1571); and

8) whether the activities are "reasonably related to their interest in maintaining observance of union scale wages and working conditions" (*Id.*).

Thus, the Court in *Carroll* apparently was satisfied that the union's activities in that case were in the union's self-interest. The Court's analysis in *Carroll* was perhaps best characterized by the district court in *Adams, Ray & Rosenberg v. William Morris Agency, supra*, at 410:

It thus appears that the test to determine if a union's actions are in its "self-interest" has not been precisely formulated. But the principle that emerges from the relevant cases is that a union's acts are in its "self-interest," as that term is used in *Hutcheson*, if they bear a reasonable relationship to a legitimate union interest.

This court concludes that, under the standards set forth in *Hutcheson* and *Carroll*, defendants' activities clearly fall within the statutory labor exemption to antitrust laws. First, it is clear that the defendant Actors' Equity has not combined with nonlabor groups, as there is an economic interrelationship between Actors' Equity and the agents alleged by plaintiffs to be a "nonlabor group." In light of this economic interrelationship affecting the legitimate union interests of Actors' Equity, the agents were a "labor group" and party to a "labor dispute," thus falling within the statutory labor exemption to antitrust laws.

The record in this case leaves little doubt as to the economic interrelationship between the members of Actors' Equity and the agents. Testimony confirmed that agents play an integral role in the industry; without an agent, an actor would have significantly lesser chances of gaining employment. The evidence clearly supports the conclusion that agents perform work and functions which actually or potentially affect the wages, job security, and working conditions of Actors' Equity members. As in *Carroll*, the agents in this case have a direct and substantial effect on the wages of union members. In short, defendants have convincingly demonstrated an economic interrelationship between agents and Actors' Equity members, and accordingly, the first prong of the *Hutcheson* test is satisfied.

Defendants have satisfied the second prong of the *Hutcheson* test as well. The regulations imposed by Actors' Equity upon its members are without doubt designed to protect union wage scales. Both franchising of agents and the restrictions on agents' commissions operate to protect wage scales; as in *Carroll*, these union activities are "a direct and frontal attack upon a problem thought to threaten the maintenance of the basic wage structure." In short, this court finds that the activities of Actors' Equity bear a reasonable relationship to legitimate union interests—union scale wages and working conditions.

Plaintiffs have offered a number of theories in their attempt to distinguish the case at hand from *Carroll*. First, plaintiffs argue that in *Carroll* the union members did not have a collective bargaining agreement with employers, such as the "father of the bride," while in the case at hand Actors' Equity has collective bargaining agreements with most of the employers of its members. This argument is of no avail, however, as Actors' Equity has a legitimate union interest in protecting its members' wages and working conditions, even beyond whatever protection is already afforded by collective bargaining agreements. Moreover, the Court's holding in *Carroll* was in no way limited to those instances where union members were not employed under collective bargaining agreements.

Second, plaintiffs argue that in *Carroll* the orchestra leaders were in competition with union members for jobs, while in the case at hand agents are not in competition with members of Actors' Equity. Plaintiffs' argument seriously misconstrues *Carroll*, unjustifiably limiting its holding to cases involving competition between union members and the alleged "nonlabor" group. In fact, *Carroll* explicitly applies where there is the "presence of a job or wage competition *or* some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors." 391 U.S. at 105-06, 88 S.Ct. at 1567 [emphasis added]. Plaintiffs' assertion that the term "economic interrelationship" is to be narrowly construed to cover situations involving actual competition is without support; the plain meaning of the Court's language in *Carroll* is that an economic interrelationship affecting legitimate union interests between Actors' Equity members and their agents will

suffice. This court recently stated in *Robert Redfield, d/b/a The Redfield Agency v. American Federation of Musicians of the United States and Canada, AFL–CIO*, 71 Civ. 3091 (S.D.N.Y. Sept. 18, 1978):

> Plaintiff argues that *Carroll* does not apply to professional booking agents such as plaintiff, but only to booking agents who also work as orchestra leaders, as did the plaintiffs in *Carroll*. Neither the language nor the rationale of *Carroll* limits its holding to cases where the booking agent is also an orchestra leader.

In short, this court concludes that *Carroll*'s economic interrelationship criterion is not limited to cases involving actual competition.

Third, plaintiffs argue that in *Carroll* booking agents apparently were not licensed or regulated by any government agency, while in the case at hand agents are licensed by the Department of Consumer Affairs of New York City and are comprehensively regulated pursuant to article 11 of the General Business Law of the State of New York. Plaintiffs' argument would perhaps carry some force, if in fact the New York licensing and regulation afforded members of Actors' Equity the same protection as the union activities in question. However, it is clear that Actors' Equity is attempting to afford protection beyond that of New York law, both by protecting members who work outside of New York and by affording protection much more comprehensive than that of New York law. The existence of protection under New York law should not preclude union attempts to protect further the interests of union members.

Fourth, plaintiffs argue that in *Carroll* the licensing provisions in question were enacted unilaterally by the union, while in the case at hand the franchising provisions were "part of a sweetheart deal to benefit TARA to the exclusion of other agents" and "part of a larger combination and conspiracy in violation of the antitrust laws." As this court's findings of fact indicate, plaintiff has not successfully demonstrated the existence of any such sweetheart deal or conspiracy. Plaintiffs have not demonstrated that Actors' Equity's regulation of agents was either applied in a discriminatory fashion favoring TARA agents or was designed to operate to the advantage of TARA agents. While TARA did request Actors' Equity to enforce the rule that Actors' Equity members may not deal with nonfranchised agents, this could hardly be a conspiracy against the plaintiffs, as the plaintiffs were TARA members at the time. Nor is TARA's agreement to Actors' Equity's increase of franchise fees sufficient evidence of conspiracy.

In cases where a plaintiff alleges a conspiracy in violation of the Sherman Act against a union, the plaintiff must meet the "clear proof" standard of proof. *Ramsey v. United Mine Workers of America*, 416 F.2d 655, 661–63 (6th Cir. 1969). In the case at hand, plaintiff has met neither the "clear proof" standard nor the more usually applicable "preponderance of the evidence" standard in its attempt to demonstrate a conspiracy between TARA and Actors' Equity.

Fifth, plaintiffs argue that in the case at hand producers conspired with Actors' Equity to not deal with nonfranchised agents. In support of this contention plaintiffs offered hearsay evidence consisting of testimony by plaintiffs' witnesses as to statements made by producers allegedly in furtherance of the conspiracy. This court took the testimony subject to proof by plaintiffs with independent evidence of the existence of such a conspiracy. The court reserved decision on defendants' subsequent motions to strike the hearsay testimony. Upon careful consideration of the record, this court now grants defendants' motion to strike, as plaintiffs have failed to prove with independent evidence the existence of any conspiracy. While this court's findings of fact discuss in detail the independent evidence allegedly establishing the existence of a conspiracy, a brief recapitulation is in order.

While Actors' Equity did request producers to refrain from dealing with nonfranchised agents, plaintiffs have not demonstrated that Actors' Equity required pro-

ducers to refrain from dealing with nonfranchised agents. Such requests certainly do not suffice to demonstrate the existence of a conspiracy. Nor do Actors' Equity's restrictions upon its own members constitute a conspiracy. Finally, plaintiffs have not successfully demonstrated a conspiracy resulting from the alleged requirement of Actor's Equity that producers identify the agent of record on the standard form individual employment contracts. In summary, as the plaintiff has failed to demonstrate with independent evidence the existence of a conspiracy between Actors' Equity and producers, the hearsay evidence as to statements of producers must be struck from the record.

Finally, plaintiffs argue that the restrictions imposed by Actors' Equity's franchising system do not further any legitimate labor objective. In particular, plaintiffs focus their challenge upon several features of the franchising system. Plaintiffs object to the prohibition of commissions on scale wage jobs, chorus jobs, out-of-town expense money, and rehearsal wages. Plaintiffs' assertion that commissions affect an actor's disposable income but do not affect wages is unpersuasive. This court concludes that, under the facts of this case, commissions on these items are intimately bound with the subject of wage scales. Unlike theatre ticket prices, photographers' fees, commuting costs, or grocery prices, commissions are directly and proportionately related to wages.

Plaintiffs also object to the requirement that agents pay fees in order to be franchised. This court is of the opinion that the franchise fees are reasonably related to the operation of the franchise system and the system's protection of wage scales and working conditions. While conceivably Actors' Equity might someday decide to charge a fee so high as to not be reasonably related to the operation of the franchise system and its goals, the facts before this court do not present that situation. In summary, this court finds that the franchising system of Actors' Equity is reasonably related to legitimate labor objectives.

Since this court concludes that defendants' activities are protected under the statutory labor exemption to antitrust laws, it is unnecessary to address several issues presented by defendants: whether Actors' Equity's regulations are unreasonable restraints of trade, whether plaintiffs are barred by their conduct from obtaining equitable relief, and whether an action can be maintained against defendant Grody in his individual capacity.

This court concludes that defendant Actors' Equity acted in its own self-interest concerning matters intimately bound with wage scales and working conditions, and without conspiring or combining with any nonlabor group. Accordingly, defendants are protected by the statutory exemption from antitrust laws. This court finds that the complaint in this action should be dismissed and judgment entered for defendants.

So ordered.

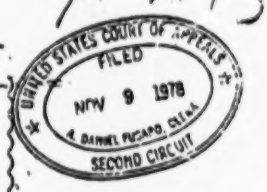
APPENDIX C
SECOND CIRCUIT AFFIMANCE OF DISTRICT COURTS DENIAL
OF A MOTION FOR PRELIMINARY INJUNCTION.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of November , one thousand nine hundred and seventy-eight.

Present:
Hon. Irving R. Kaufman,
Chief Judge,
Hon. Walter R. Mansfield,
Hon. Thomas J. Meskill,
Circuit Judges.

7-7-13



H. A. ARTISTS & ASSOCIATES, INC., S.T.E. REPRESENTATION LTD., J. MICHAEL BLOOM, LTD., DON BUCHWALD & ASSOCIATES, INC., MARJE FIELDS, INC., HENDERSON HOGAN AGENCY INC., OPPENHEIM-CHRISTIE ASSOCIATES LTD., JOEL PITT LTD., TALENT REPRESENTATIVES INC., D.M.I. TALENT ASSOCIATES, LTD., JEAN THOMAS AGENCY, INC., BOB WATERS AGENCY, INC., JACOBSON-WILDER, INC., WILLIAM D. CUNNINGHAM & ASSOCIATES, INC., TRANUM ROBERTSON & HUGHES, INC., MONTY SILVER AGENCY LTD., BRET ADAMS, LIMITED, MICHAEL THOMAS AGENCY, INC., LESTER LEWIS ASSOCIATES, INC., LEAVERTON ASSOCIATES LTD., JOE JORDAN TALENT AGENCY INC., RAGLYN-SHAMSKY, LTD., ANN WRIGHT REPRESENTATIVES, INC.,

Plaintiffs-Appellants,

v.

ACTORS EQUITY ASSOCIATION, an unincorporated association, and DONALD GRODY,

Defendants-Appellees.

78-7343

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appellants allege that Equity has unlawfully conspired with producers to prevent them from representing actors because appellants refuse to comply with Equity's franchising regulations and sought a preliminary injunction which Judge Motley denied.

To merit a preliminary injunction, "the plaintiffs must prove that they are likely to succeed on the merits and they are suffering irreparable injury, or they must prove that they have shown serious questions going to the merits and a balance of hardships tipping decidedly towards them." Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973).

Equity has offered to re-franchise appellants pendente lite. Trial has been set for February, 1979. By temporarily submitting, albeit under protest, to Equity's longstanding regulations until a disposition on the merits can be reached, appellants can avoid the economic and professional injury they might otherwise suffer as a result of the allegedly illegal franchising and "blacklisting" procedures enforced by Equity.

Thus, appellants have failed to demonstrate the requisite irreparable injury or balance of hardships. "[A] district court's denial of preliminary relief is usually subject to reversal only in the case of a clear abuse of discretion. . . ." National Association of Letter Carriers v. Sombrotto, 449 F.2d 915, 921 (2d Cir. 1971); Moore's Federal Practice, ¶ 65.04[1]. No such abuse of discretion has been demonstrated.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

Irving R. Kaufman, Chief Judge,

Walter R. Mansfield,

Thomas J. Meskill,
Circuit Judges.

C2

APPENDIX D
DISTRICT COURTS DENIAL OF MOTION FOR PRELIMINARY INJUNCTION.

H.A. ARTISTS & ASSOCIATES, INC. et al.,

Plaintiffs,

- against -

78 Civ. 2452

ACTORS EQUITY ASSOCIATION, etc., et al.,

Defendants.

APPEARANCES

SOLIN & BREINDEL
By: Howard Breindel
Daniel R. Solin
Charles Donelan
530 Fifth Avenue
New York, New York 10036

Attorneys for Plaintiffs

COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL
By: Nan C. Bases
Mary K. O'Melveny
1370 Avenue of the Americas
New York, New York 10019

Attorneys for Defendants

[illegible] MOTLEY, D.J.

Findings of Fact and Conclusions of Law

Plaintiffs are theatrical agents who are suing Actor's Equity Association (Equity) under the federal anti-trust statutes. Plaintiffs have moved for a preliminary injunction. This request is denied. See order signed this date.

Plaintiffs seek to enjoin Equity's enforcement of its rule that Equity members may not deal with agents who do not comply with Equity regulations for agents. These regulations, known as Rule A, limit the fee that agents can charge an actor. Equity also requires that agents be franchised by Equity and pay Equity a small franchise fee. Equity has entered into a collective bargaining agreement with the producers who hire the actors. As part of that collective bargaining agreement, a producer is required to send Equity a copy of any contract it makes with an actor. That contract must specify the actor's agent. In the event that Equity finds that an actor is using a nonfranchised agent, such as one of the plaintiffs here, Equity may discipline the actor. Equity also notifies the producers of the names of the agents who are not franchised by Equity. Equity has had this system in effect for some fifty years, as have other performers' unions.

In order to obtain a preliminary injunction the plaintiffs must prove that they are likely to succeed on the merits and they are suffering irreparable injury, or they must prove that they have shown serious questions going to the merits and a balance of hardships tipping decidedly towards them. Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F. 2d 247, 250(2d Cir. 1973).

In order to show a liklihood of success on the merits here the plaintiffs must show a liklihood that Equity's actions are not immune from the antitrust laws under the labor exemption. Title 15, U.S.C. §17 states:

> Antitrust laws not applicable to labor organizations
>
> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existance and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held... to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

See also 29 U.S.C. §§101-115, 15 U.S.C. §52.

A union is not exempt from the antitrust laws if it combines with a non-labor group or if its actions are not taken in its own self-interest. Connell Construction Co. v. Plumbers Local 100, 421 U.S. 635 (1975). The

court finds that plaintiffs have not shown a likelihood that Equity's actions falls into either of these two areas which are outside the labor exemption.

In American Federation of Musicians v. Carroll, 391 U.S. 99 (1968), the Supreme Court held that a musicians' union's regulation of booking agents and of food caterers was exempt from the federal antitrust laws because the agents and caterers were in an "economic interrelationship" with the members of the musicians' union such that the agents and caterers were part of a labor group and were involved in a labor dispute with the union. The Court also found that the regulations were reasonably related to the union's interest in maintaining wages and conditions for its members. See also Garrett v. American Federation of Musicians, 98 L.R.R.M. 2078 (D.S.C. 1978) (upheld musicians' union's regulation of booking agents and circulation of "unfair" list of agents who did not comply with union rules); Adams, Ray & Rosenberg v. William Morris Agency, 411 F. Supp. 403 (C.D. Ca. 1976) (denial of a preliminary injunction against writers' union's regulation of agents on the ground that Carroll was likely to control).

In Carroll, supra, the court also upheld the union's practice, similar to Equity's practice, of gather-

ing information about agents by requiring that all contracts, which included the name of the agent, be filed with the union.

Plaintiffs contend that Equity has "blacklisted" the non-franchised agents by notifying the producers that actors will be subject to discipline if they violate Equity's rules with respect to employment of non-franchised agents. The letter cited by plaintiffs does not support their contention that the producers were solicited to blacklist the plaintiffs. Plaintiffs have not shown that Equity was doing anything more than disseminating information to the producers.

While the question whether the agents and actors are in an economic relationship such that they are in a labor dispute, and the question whether the regulations are in Equity's reasonable self-interest are questions for trial, plaintiffs have not made a sufficient showing to overcome the liklihood that Equity's actions will be exempt from the federal antitrust laws under the labor exemption.

Therefore, plaintiffs' request for a preliminary injunction enjoining the operation of Equity's regulation of agents is denied.

Dated: June 29, 1978
New York, New York

Constance Baker Motley, U.S.D.J.

APPENDIX E

CLAYTON ACT §20, 29 U.S.C. §52

Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between persons employed and persons seeking employment involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other monies or things of value; or from peaceably assembling in a lawful manner, and for lawful purpose; or from doing any act or thing

which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

APPENDIX F
SECTIONS 5 - 15 OF THE NORRIS - LA GUARDIA ACT
(29. U.S.C. §105 - 115.)

§ 105. Doing in concert of certain acts as constituting unlawful combination or conspiracy subjecting person to injunctive remedies

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title.

Mar. 23, 1932, c. 90, § 5, 47 Stat. 71.

§ 106. Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

Mar. 23, 1932, c. 90, § 6, 47 Stat. 71.

§ 107. Issuance of injunctions in labor disputes; hearing; findings of court; notice to affected persons; temporary restraining order; undertakings

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief:

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Mar. 23, 1932, c. 90, § 7, 47 Stat. 71.

§ 108. Noncompliance with obligations involved in labor disputes or failure to settle by negotiation or arbitration as preventing injunctive relief

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute ei-

ther by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

Mar. 23, 1932, c. 90, § 8, 47 Stat. 72.

§ 109. Granting of restraining order or injunction as dependent on previous findings of fact; limitation on prohibitions included in restraining orders and injunctions

No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided in this chapter.

Mar. 23, 1932, c. 90, § 9, 47 Stat. 72.

§ 110. Review by Court of Appeals of issuance or denial of temporary injunctions; record; precedence

Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the court of appeals for its review. Upon the filing of such record in the court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character.

Mar. 23, 1932, c. 90, § 10, 47 Stat. 72; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

§§ 111, 112. Repealed. June 25, 1948, c. 645, § 21, 62 Stat. 862, eff. Sept. 1, 1948

§ 113. Definitions of terms and words used in chapter

When used in this chapter, and for the purposes of this chapter—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or

who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

Mar. 23, 1932, c. 90, § 13, 47 Stat. 73.

§ 114. Separability of provisions

If any provision of this chapter or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of this chapter and the application of such provisions to other persons or circumstances shall not be affected thereby.

Mar. 23, 1932, c. 90, § 14, 47 Stat. 73.

§ 115. Repeal of conflicting acts

All acts and parts of acts in conflict with the provisions of this chapter are repealed.

Mar. 23, 1932, c. 90, § 15, 47 Stat. 73.

APPENDIX G

GENERAL BUSINESS LAW OF THE STATE OF NEW YORK, ARTICLE 11

§180. Theatrical employment; financial investigations and security

A theatrical employment agent shall investigate whether or not any employer (person, firm or corporation) who is offering employment to an applicant for employment has defaulted in the payment of salaries, fees or other compensation to any performer or group of performers or has left stranded any performing companies or individuals or groups, during the five years preceding the date of the application. An agent shall not procure or undertake to procure employment or engagements on the part of any performer or groups of performers for an employer who has failed to pay salaries, fees or other compensation, or who has left stranded any performer or groups of performers or any performing companies or individuals during the five years preceding the date of the application, unless such employer (person, firm or corporation) shall provide sufficient security for the direct benefit of the performer or performers and in an amount ample to pay the performer or performers their full compensation for the special employment or engagement designated in the employment or engagement contract. The provisions of this section shall not apply to employment or engagements in modeling.

§183. Theatrical employment; contracts

Every licensed person who shall procure for or offer to an applicant a theatrical engagement shall have executed in duplicate a contract or deliver to the parties as herein set forth

a statement containing the name and address of the applicant; the name and address of the employer of the applicant and of the person acting for such employer in employing such applicant; the time and duration of such engagement; the amount to be paid to such applicant; the character of entertainment to be given or service to be rendered; the number of performances per day or per week that are to be given by said applicant; if a vaudeville engagement, the name of the person by whom the transportation is to be paid, and if by the applicant, either the cost of transportation between the places where said entertainment or services are to be given or rendered, or the average cost of transportation between the places where such services are to be given or rendered; and if a dramatic engagement the cost of transportation to the place where the service begin if paid by the applicant; and the gross commission or fees to be paid by said applicant and to whom. Such contracts or statements shall contain no other conditions and provisions except such as are equitable between the parties thereto and do not constitute an unreasonable restriction of business. Forms of such contract and statement in blank shall be first approved by the commissioner and his determination shall be reviewable by certiorari. One of such duplicate contracts or of such statements shall be delivered to the person engaging the applicant and the other shall be retained by the applicant. The licensed person procuring such engagement for such applicant shall keep on file or enter in a book provided for that purpose a copy of such contract or statement.

§185. Fees

1. Circumstances permitting fee. An employment agency shall not charge or accept a fee or other consideration unless in accordance with the terms of a written contract with a job applicant, except for class "A: and "A1" employment, and except after such agency has been responsible for referring such job applicant to an employer or such employer to a job applicant and where as a result thereof such job applicant has been employed by such employer. The maximum fees provided for herein for all types of placements or employment may be charged to the job applicant and a similar fee may be charged to the employer. By agreement with an employment agency, the employee may voluntarily assume payment of the job applicant's fee. The fees charged to employers by any licensed person conducting an employment agency for rendering services in connection with, or for providing employment in classes "A", "A1", and "B", as hereinafter defined in subdivision four of this section where the applicant is not charged a fee shall be determined by agreement between the employer and the employment agency. No fee shall be charged or accepted for the registration of applicants for employees or employment.

2. Size of fee; payment schedule. The gross fee charged to the job applicant and the gross fee charged to the employer each shall not exceed the amounts enumerated in the schedule set forth in this section, for any single employment or engagement, except as hereinabove provided; and such fees shall be subject to the provisions of section one hundred eighty-six of this article. Except as otherwise provided herein, an employment agency shall

not require an applicant, while employed in the continental United States, and paid weekly, to pay any fee at a rate greater than in six equal weekly installments each of which shall be payable at the end of each of the six weeks of employment or, if paid less frequently, in three equal installments, each of which shall be payable at the end of the first three pay periods following his employment, or within a period of six weeks, whichever period is shorter. An employer's fee shall be due and payable at the time the applicant begins employment, unless otherwise determined by agreement between the employer and the agency.

3. Deposits, advance fees. Nothwithstanding any other provisions of this section, an employment agency may not require a deposit or advance fee from any applicant except an applicant for class "A" or class "A1" employment, and only to the extent of the maximum fees hereinafter provided. Such deposit or advance fee shall be offset against any fee charged or accepted when such employment is obtained. Any excess above the lawful fee shall be returned without demand therefor, immediately after the employment agency has been notified that such employment has been obtained; and all of such deposit or advance fee shall be returned immediately upon demand therefor, if at the time of the demand such employment has not been obtained.

4. Types of employment. For the purpose of placing a ceiling over the fees charged by persons conducting employment agencies, types of employment shall be classfied as follows:

Class "A" - domestics, household employees, unskilled

or untrained manual workers and laborers, including agricultural workers;

Class "A1" - nonprofessional trained or skilled industrial workers or mechanics;

Class "B" - commercial, clerical, executive, administrative and professional employment, all employment outside the continental United States, and all other employment not included in classes "A", "A1", "C" and "D";

Class "C" - theatrical engagements;

Class "D" - nursing engagements as defined in article one hundred thirty-nine of the education law.

5. Fee ceiling. For a placement in class "A" employment the gross fee, including the deposit if any, shall not exceed, in percentage of the furst full month's salary or wages, the following:

where no meals or lodging are provided.....10%

where one meal per working day is provided.....12%

where two meals per working day are provided.....14%

where three meals and lodging per working day are provided.....18%

Where all parties to the employment agreement understand or agree at the time the employment is entered into that it shall be for a period shorter than one month, the gross fee shall not exceed ten per cent, twelve per cent, fourteen per cent or eighteen per cent respectively of the salary or wages actually paid.

6. Fee ceiling. For a placement in Class "A1" employment the gross fee shall not exceed one week's wages where all parties to the employment agreement understand or agree at the time

the employment is entered into that it shall be for a period for ten weeks or more. Where all parties to the employment contract agree and understand at the time the employment contract is entered into that it shall be for a period shorter than ten weeks, the gross fee shall not exceed ten per cent of the wages or salary actually received.

7. Fee ceiling. For a placement in Class "B" employment the gross fee shall not exceed, in percentage of the first full month's salary or wages, the following:

where such first full month's salary or wages is

less than $225.....25%

at least $225 but less than $270.....35%

at least $270 but less than $300.....40%

at least $300 but less than $330.....45%

at least $330 but less than $365.....50%

at least $365 but less than $400.....55%

at least $400 or more.....60%

Provided however, that where the placement is for employment in which the applicant will be paid on a straight commission basis or on the basis of a drawing account plus commissions, the gross fee shall be based on percentages in the above schedule applied to an amount equivalent to one-twelfth of the estimated first year's earnings, as estimated by the employer.

Where all parties to the employment contract agree and understand at the time the employment contract is entered into that it shall be for a period shorter than four months the gross fee shall not exceed fifty per cent of the fee prescribed in the schedule in this subdivision or ten per cent of the wages or salary actually received, whichever is less.

8. Fee ceiling. For a placement in class "C" employment the gross fee shall not exceed, for a single engagement, ten per cent of the compensation payable to the applicant, except that for employment or engagements for orchestras and for employment or engagements in the opera and concert fields such fees shall not exceed twenty per cent of the compensation.

9. Fee ceiling. For a placement in class "D" employment the gross fee shall not exceed, for a single engagement, the following:

(1) for private nursing duty, five per cent of the salary or wages received each week through the first ten weeks of that engagement only, and such fee shall be due and payable at the end of each such week;

(2) for any other nursing duty, the amount of the first week's salary or wages unless the first year's computed salary or wages to be derived for at least one year's employment is twenty-five hundred dollars or more, in which event the gross fee shall not exceed, in percentage of such salary or wages, the following:

where such first year's salary or wages is:

at least $2500 but less than $3000.....2-1/2%

at least $3000 but less than $3500.....3%

at least $3500 but less than $4000.....3-1/2%

at least $4000 but less than $4500.....4%

at least $4500 but less than $5000.....4-1/2%

$5000 or more.....5%